

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Level 3 Communications, LLC

Petition for Declaratory Ruling That Certain
Right-of-Way Rents Imposed by the New York
State Thruway Authority Are Preempted Under
Section 253

Docket No. WC 09-153

**REPLY COMMENTS OF THE
CITY OF ST. LOUIS, MISSOURI**

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SUMMARY

The City of St. Louis, Missouri spent several years in litigation defending its license fee requirement for the use of its rights-of-way. In a challenge similar to the one made here, Level 3 sued the City to invalidate the license fee even after the company had voluntarily entered into a license agreement and had paid the fee for several years. Ultimately, the courts upheld the City's license fee because Level 3 failed to provide sufficient evidence that the fee actually or effectively prohibited its ability to provide service in the City, as required to sustain a claim under 47 U.S.C. § 253(a). The litigation finally came to an end in June 2009, when the Supreme Court denied certiorari.

St Louis agrees with the New York State Thruway Authority ("NYSTA") and other commenters that this case can be dismissed – and should be dismissed – because it does not fall within the scope of Section 253, and additionally because it involves Section 253(c) questions the Commission has no jurisdiction to resolve. On the merits, St. Louis believes the Level 3 challenge to the NYSTA claims would fail for the same reason Level 3's challenge to St. Louis's license fee failed, namely the company has failed to provide sufficient evidence on the record that it has been actually or effectively prohibited from providing service. Ultimately, however, this is a question of fact for the Commission to decide if it elects to reach the merits.

Of more immediate concern to St. Louis is that this proceeding not be used, improperly, as a means to reinstitute claims that have already been lost in courts that have applied the very tests that this Commission has endorsed. Certain telecommunications providers other than Level 3, including AT&T, Qwest and Verizon, have urged the Commission to broaden this proceeding beyond the present dispute into a rulemaking on the standards for interpretation and application of 47 U.S.C. § 253. These providers ask the Commission to alter and weaken existing standards for determining what constitutes a violation of 47 U.S.C. § 253(a), and to limit fees a

municipality can charge for the use of the rights-of-way to a municipality's costs pursuant to 47 U.S.C. § 253(c). The Commission should reject that effort.

The telecommunications providers support their position by arguing that federal courts are in “disarray” as to how to interpret and apply Section 253; and by providing anecdotes, largely unsupported by any evidence, of how municipalities have been bad actors, abusing their monopoly powers and demanding exorbitant fees. The providers are wrong. The law with respect to what constitutes a violation of Section 253 is not in disarray. To the contrary, the Commission handed down standards for applying the statute more than a decade ago in cases like the *California Payphone Order*, 12 F.C.C.R. 14,191 (1997). The courts, construing the plain language of the statute, have for the most part, adopted and applied that test. Recent circuit court decisions in the Eighth and Ninth Circuits¹ demonstrate that the courts have coalesced around these standards. There is no reason for the Commission to revisit its standards.

The anecdotal examples given by the telecommunications providers are misleading, demonstrating why it is imperative to allow all of the municipalities who are the subject of such anecdotes the opportunity to submit evidence before the Commission makes any sweeping changes to its standards for applying Section 253(a). Thus, if the Commission decides to revisit its standards, it should decline to do so in this limited proceeding.

¹ *Level 3 Communications, LLC v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 577 (9th Cir. 2008) (*en banc*).

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The City of St. Louis, Missouri (the “City” or “St. Louis”), through its undersigned counsel, hereby files these reply comments in opposition to the petition (“Petition”) filed by Level 3 Communications, LLC (“Level 3”).

BACKGROUND AND OVERVIEW

The City has spent years defending a legal challenge brought by Level 3 that raised similar issues as to the meaning of Section 253. The court of appeals decision that ultimately resolved the dispute applied the test adopted by this Commission. And, subject to the jurisdictional concerns discussed below, St. Louis would not be concerned by the continued application of that test, by the Commission and by the courts, to determine whether local laws and regulations should be preempted. But St. Louis has a substantial interest in this proceeding since some commenters have sought to reverse these established Commission standards.

The City believes Level 3’s claims in this matter – that the fees it agreed to pay NYSTA violate 47 U.S.C. § 253(a) – should fail for the same reason Level 3’s challenge to St. Louis’s license fee failed, namely the company has failed to provide sufficient evidence on the record that it has been actually or effectively prohibited from providing service. Ultimately, however,

this is a question of fact that the FCC must study closely, to the extent it elects to reach the merits and not leave the matter to the courts, or dismiss it outright on jurisdictional grounds.

Of greater importance to the City, however, is the attempt by certain other telecommunications providers, including AT&T, Qwest and Verizon, to convert this proceeding into a broad rulemaking to alter and weaken existing standards for determining what constitutes a violation of 47 U.S.C. § 253(a), and, pursuant to 47 U.S.C. § 253(c), to limit fees a municipality can require for the use of the rights-of-way to a municipality's costs. AT&T argues that federal courts are in "disarray" as to how to interpret and apply Section 253,² and argues that the Commission should alter its existing standards in three significant ways: (i) it should downplay the requirement that there be evidence of a "practical effect" on a complainant in order to establish an effective prohibition; (ii) it should rule that any regulations that govern *initial entry* into a market (*i.e.* permitting, certificate and franchise requirements) can be challenged even before they have any practical effect; and (iii) it should rule categorically that any non-cost based right-of-way fees are not saved by Section 253(c).³

Qwest argues without citing to any authority "the preemptive scope of Section 253(a) is very broad and a carrier's burden of proof under this Section is light, while the savings clause of Section 253(c) is narrow and the local government's burden is heavy."⁴ Qwest further argues that the Commission should adopt a standard that fees that, for example, "negatively impact competition," "are applied in a discriminatory manner," or are "material[ly] increase[d]" are in and of themselves prohibitory under Section 253(a).⁵ Once this flimsy standard is met, Qwest

² Comments of AT&T, Inc. ("AT&T Comments") at 1.

³ *Id.* at 17-19.

⁴ Comments of Qwest Communications International, Inc. ("Qwest Comments") at 9.

⁵ *Id.* at 13. Qwest's proposed standards are flawed on their face. What if, for example, a municipality charged one provider \$1.00 per linear foot to be in the rights-of-way and charged a

urges the Commission to require that a municipality endure the costly burden of providing evidence that the fees are related to the actual use of the rights-of-way, the extent of a carrier's use of its rights-of-way, the nature of a carrier's use of the rights-of-way, the costs of maintaining the rights-of-way, and impact of the fees on competition. Qwest of course understands that the studies it calls for could cost hundreds of thousands of dollars to create, and then would be subject to court challenge; but its point is to create a set of rules that prevent localities from recovering anything other than permitting fees.⁶

Verizon in turn proposes that the Commission turn Section 253 on its head and find that unless a fee is "fair and reasonable" and "nondiscriminatory" under Section 253(c), it violates Section 253(a).⁷ The company also urges the Commission to rule that fees are unreasonable *per se* under Section 253(c) if they exceed a municipality's costs incurred because of the deployment of a carrier's facilities in the rights-of-way.⁸

The City urges the Commission not to expand this proceeding far beyond its scope in order to revisit and weaken its existing standards for applying Section 253. Contrary to what is argued by the telecommunications providers, the law with respect to what constitutes a violation of 47 U.S.C. § 253, is not in "disarray." The Commission has handed down clear standards for

second provider \$.80 per linear foot but received the use of conduit from the second provider for twenty years? Are the fees all *per se* invalid because they are not identical? That cannot be right because Section 253 "does not require precise parity of treatment." *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2001). *See also TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000). Likewise, the notion that any increase is a prohibition and inherently unreasonable is illogical – and certainly not a test the providers would apply to their own rates and charges. What if a City imposed a fee of \$.05 per linear foot but then increases it to \$.25 per foot – a 500% increase. Under the Qwest test, the increase would be stricken on its face even though it remained far below what Level 3 argued are "prevailing market rents."

⁶ *Id.* at 13.

⁷ Comments of Verizon and Verizon Wireless ("Verizon Comments") at 14-16.

⁸ *Id.* at 16-18.

applying the statute, and most courts have adopted that standard as consistent with the plain meaning of Section 253. As the Solicitor General argued in a recent brief to the Supreme Court,

The courts of appeals uniformly recognize that the FCC's *California Payphone Order*, 12 F.C.C.R. 14,191 (1997), prescribes the applicable standard for determining whether a legal requirement has the effect of prohibiting the ability to provide a telecommunications service.⁹

The Solicitor General went on to note that while courts may not always be consistent in applying the standard, any such inconsistency has not been sufficiently stark to warrant resolution at this time.¹⁰ That is as true now as it was then.

But even if the Commission were to decide to revisit its standards for applying Section 253(a), it should certainly not do so in this limited proceeding, where the Petitioner itself did not indicate it sought such comprehensive changes. And that is particularly so because, as NYSTA and other commenters have argued, this case should not even be heard by the Commission given both the contractual nature of the dispute and the jurisdictional limits on the Commission's own authority to resolve cases arising under Section 253. For these reasons, the Commission should decline the carriers' request to expand this proceeding and should reject Level 3's petition on the factual record (or lack thereof) of this proceeding.

ARGUMENT

I. CONTRARY TO WHAT THE CARRIERS ARGUE, THE COMMISSION HAS ADOPTED CLEAR STANDARDS FOR APPLYING 47 U.S.C. § 253(A), AND THE SAME STANDARD IS BEING APPLIED BY MOST COURTS OF APPEALS.

A. Standards Adopted by Commission

The Commission has clearly noted that there are *two* distinct inquiries under Section 253(a). *In re Cal. Payphone*, 12 F.C.C.R. 14191, 14204-14206 ¶¶ 27, 30-31 (1997). The

⁹ Brief for the United States as Amicus Curiae at 9, *Level 3 Communications, LLC v. City of St. Louis*, Nos. 08-626 and 08-759, at 9 (U.S. Filed May 28, 2009) ("U.S. Amicus Brief").

¹⁰ *Id.*

Commission begins by asking whether a local requirement serves as an “express legal prohibition” that “completely bar[s] prospective competitors from lawfully providing . . . service.” *Id.* at ¶ 30. Second, if there is no express bar, the Commission proceeds to assess whether a local requirement “has the effect of prohibiting” the ability to provide service. *Id.* at ¶ 31. To do so, the Commission asks whether the local requirement “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” *Id.*

In applying these standards, the Commission has instructed that there can be no finding of an effective prohibition based on mere speculation. Rather – at least where the prohibitory effect is questioned – a plaintiff must present evidence of the practical effect of the requirements on its ability to provide service. *Id.* at ¶ 27. A plaintiff challenging a local requirement bears the burden:

Parties seeking preemption of a local legal requirement . . . must supply us with *credible* and *probative evidence* that the challenged requirement falls within the proscription of Section 253(a).

In re TCI Cablevision of Oakland County, Inc., 12 FCC Rcd. 21396, 21440 ¶ 101 (1997) (emphasis added).¹¹ As a general matter, this will require proof as to the economic impact of a challenged regulation, and whether it renders the provision of a service economically impractical.¹²

¹¹ See also, U.S. Amicus Brief at 8

¹² Industry commenters argue that the standard is “flexible” and sometimes does not require much economic analysis. That may be true where the impact is obvious – as where a competitor is given the right to veto market entry. *In re Silver Star Tel. Co.*, 12 FCC Rcd. 15,639, 15,656 ¶ 38 (1997). But in cases involving right-of-way compensation, the effect is not obvious. In the first place, a grant to use rights-of-way actually permits, rather than prohibits, the provision of service by allowing a provider access to property that they do not own, and to which they may have no inherent right of access. The NYSTA property is an example. Second, the rent, as an operating expense, can be passed through, and so need not have any effect on profits or on

B. The Courts Have Correctly Applied the Commission's Standards.

In *Level 3 v. City of St. Louis*, Level 3 challenged the City's linear-foot license fee requirements after the company had willingly entered into a license agreement and paid the license fee for more than four years. In that case, the City had argued that Level 3's challenge should fail because Level 3 had failed to establish evidence on the record of an actual or effective prohibition, as required under 47 U.S.C. § 253(a). Level 3, on the other hand, argued that it was not required to show an actual or effective prohibition, but instead the focus must be on scope of the regulatory authority the City was exercising – without regard to whether there was any effect. The mere possibility that there could be a prohibition under undefined circumstances was enough. While the district court initially preempted the City's fee requirement applying a “may prohibit” standard, the Eighth Circuit reversed. The court, adopting the Commission's standards from *Cal. Payphone*, ruled “a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.” *Level 3 Communications, LLC v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007). The court found that a “thorough review of the entire record” showed “insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations.” *Id.* at 534.

Upon remand, the district court entered judgment in favor of the City, which was upheld by the Eighth Circuit. *Level 3 Communications, LLC v. City of St. Louis*, 540 F.3d 794 (8th Cir. 2008). The Supreme Court, after inviting the Solicitor General to file a brief on behalf of the United States, ultimately denied Level 3's Petition for Certiorari. *Level 3 Communications, LLC*

deployment. It is thus important to show precisely what the Commission requires: a material impact on the provision of services.

v. City of St. Louis, 129 S. Ct. 2859 (2009). In all, the City spent more than four and a half years and hundreds of thousands of dollars in legal expenses litigating with Level 3.

In *Sprint Telephony PCS v. County of San Diego*, the Ninth Circuit, sitting *en banc*, overruled *City of Auburn v. Qwest*, 260 F.3d 1160, 1176 (9th Cir. 2001). In *Auburn*, the Ninth Circuit stated that “Section 253(a) preempts regulations that not only ‘prohibit’ outright the ability of any entity to provide telecommunications services, but also those that ‘may . . . have the effect of prohibiting’ the provision of such services.” *Id.* at 1175 (quoting *Bell Atlantic v. Prince George’s County*, 49 F. Supp. 2d 805, 814 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000)) (emphasis added).

The Ninth Circuit’s language in *Auburn* soon became a substantive standard that was used by some district courts in the Ninth Circuit and elsewhere to overturn municipal requirements based on mere speculation that they might be applied in a manner that prohibits competition. The exact meaning of the “may prohibit” test was never very clear. For example, in *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), the Ninth Circuit concluded that under the “may prohibit” test, Qwest was not required to make an actual showing of “a single telecommunications service that it is effectively prohibited from providing”. *Qwest Corp. v. City of Berkeley*, 433 F.3d 1253, 1256-58 (9th Cir. 2006). As a result, the test generated substantial confusion as to what sort of showing was sufficient to show an “effective prohibition” under Section 253(a).

Matters came to a head in *County of San Diego*. There, Sprint had made a facial challenge to the County’s wireless telecommunications ordinance, even though the evidence indicated it had never actually been denied a siting permit. Relying on *Auburn*, the district court upheld Sprint’s facial challenge, which was then upheld by a three-judge Circuit panel. Sitting *en banc*, the Ninth Circuit reversed, abandoning the “may prohibit” standard and overturning

Auburn. The Ninth Circuit expressly joined the Eighth Circuit in holding that “a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.” 543 F.3d at 578 (quoting *City of St. Louis*, 477 F.3d at 532).

As the United States noted in its brief to the Supreme Court, both the Eighth and Ninth Circuits, the most recent circuit courts to address Section 253, correctly applied the Commission’s standards by holding that a plaintiff cannot meet its burden under Section 253(a) by asserting the mere possibility that legal requirement might affect the ability to provide service. Rather, a plaintiff must present actual evidence of the practical effects of the challenged requirements.¹³ “The mere possibility that a state or local requirement might prevent a telecommunications carrier from providing service is not sufficient to violate Section 253(a).¹⁴

Moreover, while *Auburn* generated some confusion in the Ninth Circuit and in district courts, the decision in *Sprint* actually eliminated conflicts with other Courts of Appeals, which had generally adopted the FCC’s tests for effective prohibition. *TCG N.Y. Inc. v. City of White Plains*, 305 F.3d 67, 76 (2nd Cir. 2002), *cert. denied*, 538 U.S. 923 (2003); *Qwest Corp. v. Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); *Puerto Rico Tel. Co. v. Mun. of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006). In each of the cases, the courts have only found a prohibition where a provider could point to an actual impact – or where claims of impact were unrebutted.

For example, in *City of White Plains*, the Second Circuit applied the FCC’s “materially inhibits or limits” test to preempt various provisions of the City of White Plains’ ordinance under Section 253. 305 F.3d at 76 (quoting *Cal. Payphone*, 12 F.C.C.R. at 14209 ¶ 31). In that case, there was evidence that TCG had unsuccessfully negotiated for 18 months to obtain a franchise to provide services in the City. *Id.* at 71-72. The Second Circuit found a Section 253(a)

¹³ U.S. Amicus Brief at 8, 10-11.

¹⁴ *Id.* at 12.

violation based on two factors, including the City’s “right to reject any [franchise] application based on any ‘public interest factors . . . that are deemed pertinent by the City,’” and the City’s “extensive delays” in processing TCG’s franchise application. *Id.* at 76. Thus, the City had exercised its discretion to cause the very harm that was at the center of the suit – the denial of TCG’s market entry.

In *Santa Fe*, the Tenth Circuit, applying the same “materially inhibit” standard, held that the City had improperly retained the right to deny an application on any basis and to seek any information, without any standards or limits. This, the court stated, amounted to unlawful “unfettered discretion” inconsistent with Section 253(a). *Id.* at 1270 n.9. Further, the court found that rent and appraisal provisions of the Santa Fe ordinance would “nearly quadruple Qwest’s costs of doing business” in the City. *Id.* at 1271. Based on this evidence that the court described as a “massive increase in costs” over the existing fee structure, which was apparently unrebutted, and the actual, significant delays, the court held that such requirements ran afoul of Section 253(a). *Id.* At most then, it can be said that the Tenth Circuit concluded that *in the absence countervailing information*, evidence of a massive increase in costs can be enough to show a requirement has a prohibitory “effect.” *Guayanilla* is to similar effect.

And while “some circuits have interpreted the Commission’s standard through the lens of *Auburn*’s more preemptive ‘may’ standard . . . the conflict is not sufficiently settled or stark to warrant [Supreme Court] review.”¹⁵ Nothing has occurred to change that conclusion.

AT&T argues that the Ninth Circuit, in a recent unpublished decision, has strayed from the Commission standards by refusing to preempt a municipal requirement “for the sole reason that the evidence demonstrated the plaintiff’s ‘continued operation’ in the municipality in

¹⁵ U.S. Amicus Brief at 9.

question.”¹⁶ Put another way, AT&T argues that the Ninth Circuit has adopted a new “bright-line rule: if a provider continues to operate in a market despite the application of a particular regulation, the regulation cannot run afoul of § 253(a).”¹⁷ AT&T’s characterization of the decision is simply wrong. The Ninth Circuit rejected Qwest’s preemption challenge of certain one-time, in-kind requirements because “they were provided to the City twelve years ago, do not vest the City with broad discretion, and they do not have the effect of prohibiting the provision of telecommunications service, *as demonstrated by Qwest’s continued operation*.”¹⁸ Nothing in the Ninth Circuit’s reasoning indicates that the Ninth Circuit was adopting a bright-line test or was considering only the fact that Qwest was continuing to operate in the City. The decision cites the *San Diego* opinion for the correct standard for whether a requirement violates Section 253. The Ninth Circuit was merely affirming the district court, which found that the challenged in-kind provisions failed to meet the *Auburn* “may prohibit” standard then in effect in the Ninth Circuit. *Time Warner Telecom of Oregon, LLC v. City of Portland*, 452 F. Supp. 2d 1084, 1092-93, 1098 (D. Or. 2006).

As a second ground for revising the FCC’s standards, the providers also have suggested the Commission should interpret Section 253 in a manner that promotes the competitive goals of the Telecommunications Act. However, the preemptive sweep of Section 253(a)’s plain language cannot be broadened merely to promote the abstract notion of competition. The Supreme Court came to a similar conclusion in finding that the FCC could not depart from the “ordinary and fair” meaning of “impair” in Section 251(d)(2)(B), even though the agency

¹⁶ AT&T Comments at 1 (citing *Time Warner Telecom of Oregon, LLC v. City of Portland*, 322 F.App’x 496, 498 (¶1) (9th Cir. April 8, 2009) *petition for cert. pending*, No. 09-309 (filed Sept. 8, 2009)).

¹⁷ *Id.* at 6. Qwest also joins in this argument. Qwest comments at 10.

¹⁸ *Time Warner Telecom*, 322 F.App’x 496 at ¶ 1(emphasis added).

believed a broader definition would speed competition. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90 (1999). Congress’s use of “prohibit or have the effect of prohibiting” must be given a meaning that reflects the use of those terms, rather than the less demanding “impair” standard in Section 251(d)(2)(B) or “impede” standard in Section 228(g)(4). *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Nor can the providers justify departure from Section 253(a)’s plain language by referring to the general purposes of the Act. “[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.” *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). That observation is particularly apt here, given that the extended legislative history of Section 253 shows Congress’s specific purpose is well-served through a focus on requirements that “prohibit” or have that “effect.” As the First Circuit observed, Section 253(a), as adopted, was primarily concerned with uprooting regulatory systems that granted telephone monopolies:

Congress apparently feared that some states and municipalities might prefer to maintain monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service. § 253(a) takes that choice away from them, thus preventing state and local governments from standing in the way of Congress’ new free market vision.

Cablevision of Boston, Inc. v. Pub. Improvement Comm’n, 184 F.3d 88, 97-98 (1st Cir. 1999); *see also Iowa Utils. Bd.*, 525 U.S. at 405 (Thomas, J., concurring in part, dissenting in part).

In short, industry commenters have urged the Commission to adopt new standards for addressing and interpreting Section 253, but their reasoning falls flat. Rather than being in a state of disarray, the courts have coalesced around the Commission’s standards for applying the statute. To reiterate, in order to establish a claim under Section 253(a), a challenger must provide evidence to show the practical effects of the requirement it is challenging, and the evidence must show that the requirement “materially inhibits” the ability of any competitor to

provide telecommunication services.¹⁹ This reading comports with the plain language of the statute. Moreover, in light of the more recent Eighth Circuit and Ninth Circuit decisions, and the U.S. Amicus Brief affirming these standards, it seems unlikely that future circuits will apply the wrong standard. There is no compelling reason to revisit the standards here. If anything, revisiting the standards as urged by commenters would likely create a new wave of confusion in the courts, and open the door to a new wave of litigation or relitigation.

II. THE STANDARDS URGED BY THE CARRIERS ARE INCONSISTENT WITH THE PLAIN LANGUAGE OF SECTION 253.

The standards urged by the providers for applying Section 253 are inconsistent with the plain language of Section 253 and would render meaningless Commission standards established more than a decade ago, which largely have been adopted by the courts. AT&T, for example, urges the Commission to “reaffirm” the *California Payphone* standard, which is wholly unnecessary in light of the trend of the cases in correcting applying the standard. AT&T then turns around and requests the Commission downplay the requirement that a challenger show evidence of the practical effect of a challenged requirement.²⁰ Further, AT&T suggests that the requirement that a challenger show the “practical effect” of the challenged requirement should be eliminated entirely with respect to regulations that govern initial entry into a market, such as franchise or permitting requirements.²¹ AT&T’s proposal, if adopted, would result in utter

¹⁹ U.S. Amicus Brief at 11-12.

²⁰ AT&T Comments at 17-18.

²¹ *Id.* at 18. It is of course obvious that in an “initial entry” situation, the evidentiary showing may be different than in a case where someone already in the market is claiming that a requirement with which they have complied for years is prohibitory. In the latter, one would expect the provider to show at least some past impacts, while in the former, generally there will be no “past impact” on the person seeking entry. However, a new entrant can still show the practical effect on, *e.g.*, capital costs, ability to obtain financing, or the effect of a requirement on the economic viability of entry. In *California Payphone*, after all, providers were seeking to install payphones in a different geographic area, and the Commission nonetheless required

chaos. AT&T essentially argues that the Commission should reject its previous rulings and instead adopt the *Auburn* preemption by speculation standard. AT&T's proposal not only conflicts with the plain language of Section 253(a) but it would turn back more than a decade of Commission precedent, around which the courts have finally coalesced following the confusion that followed in the wake of *Auburn*.

Qwest on the other hand urges the Commission to adopt a new standard greatly reducing the burden on providers to provide evidence of an actual or effective prohibition under Section 253(a), while at the same time greatly increasing a government's burden to show that a requirement is saved under Section 253(c).²² Qwest cites no authority for this position and it would be in direct conflict with the plain language of the statute and the Commission's previous holdings. It also defies a basic canon that preemption statutes are to be read narrowly. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Altria Group v. Good*, 129 S. Ct. 538, 543 (2008) (courts must accept "the reading that disfavors preemption") – a canon that was codified in Section 601 of the Telecommunications Act, 47 U.S.C. § 152 nt.

providers to make such an economic showing. Moreover, in some cases – where, for example there are challenged permit requirements – there may be very relevant historical evidence. The fact that many others have been able to obtain permits is compelling evidence that there is no effective prohibition. There is no reason to permit a new entrant to presume "prohibition" because there is a permitting requirement.

It is worth remembering that the permitting, leasing and franchising processes are the means by which telecommunications providers obtain access to property that they do not own. The processes do not prohibit entry – they *allow* entry. In order to find those processes prohibitory by nature, the Commission would have to find that Section 253 essentially granted telecommunications providers control of private and public property throughout the United States – that is, that the exercise by others of property rights is inherently prohibitory. Section 253 cannot support such a rule

²² Qwest Comments at 9.

Verizon would turn the statute on its head by having the Commission transform Section 253(c) into the substantive test for preemption, not just a safe harbor.²³ In the 13 years since Section 253 was adopted, the FCC has never suggested that Section 253(c) is the substantive test for finding preemption under subsection (a).²⁴ The reason is obvious: the plain language does not allow it. By its plain language, Section 253(c) is a safe harbor: “Nothing in this section affects . . .” 47 U.S.C. § 253(c), while Section 253(a) provides the substantive test: “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a). By definition, then, Section 253(b)-(c) protects certain actions even if they *are* prohibitory. But it does not follow logically that everything that is not protected is prohibited – otherwise, Section 253(a) would have been completely unnecessary.²⁵ Section 253(c) has been compared to an affirmative defense. According to Verizon’s logic, any person accused of murder who failed to demonstrate he was insane or acting in self-defense (affirmative defenses) would be *per se* guilty, without any other showing – including a showing that someone had been killed or that the defendant had committed the murder. Verizon defends its reading as “logical”; it is the height of illogic.

Indeed, there are many cases where fees will not be prohibitory, even if the fees fall outside the ambit of Section 253(c). A rent to use an office in a building owned by a city is not a

²³ Verizon Comments at 14-15.

²⁴ Some courts such as *TCG Detroit* have suggested that § 253(c) provides an independent basis for preemption but those cases are rare and wrong. U.S. Amicus Brief at 19.

²⁵ Verizon’s reliance on a quote from *TCI Cablevision* is misplaced. When the Commission stated that a local government that chooses to manage its rights-of-way and collect fee must do so in a competitively neutral and nondiscriminatory manner, it was referring to what a government must do to fall within the safe harbor of Section 253(c). *TCI Cablevision*, 12 FCC Rcd. at 21,443 ¶ 108 (1997). The Commission did not hold that every fee or charge that is not within Section 253(c) is inherently prohibitory under Section 253(a).

fee for a “right-of-way,” and it involves proprietary powers and not police powers, which are the subject to Section 253(b). Nonetheless, it is hard to imagine that the refusal to rent to one company would be prohibitory, even if the community had rented to another. A community may own a rooftop, which it (like other property owners) chooses to lease. Any fee for the rooftop would fall outside the ambit of Section 253(c); but it is not obvious that any fee would be prohibitory. A local government that unreasonably and irrationally discriminates by charging one provider a nickel and another a quarter does not *per se* run afoul of Section 253(a); the provider still must show the \$0.20 disparity “effectively prohibits” its ability to provide service. It may well be inconsequential. Likewise, if a provider sought access to state or locally owned conduit in rights-of-way that ran parallel to an railroad easement, the local government would not necessarily run afoul of Section 253(a) by setting an outrageously high price for its property, if the railroad easement was also available. The provider’s “ability” to provide service would not be impeded, let alone prohibited, by the fee.²⁶

Verizon’s argument also proves too much. If a state or local fee falls outside of Section 253(c), according to Verizon, it is inherently prohibitory under Section 253(a). But if that were so, states and local governments would be barred from charging anything for access to property other than rights-of-way, as Section 253(c) only deals with rights-of-way.²⁷ For example, a municipally-owned electric utility could not charge anything for access to poles or conduits, or a

²⁶ In interpreting the term “impair” in Section 252, the courts have cautioned that in determining whether denial of access to a facility impairs the ability of a provider to offer services, the alternatives available to the provider must be considered. *Iowa Util. Bd.*, 525 U.S. at 389-90. By analogy, the mere fact that access to a right-of-way is overpriced does not prove a prohibition.

²⁷ In fact, because Section 253 is not aimed at government property but at “statutes, regulations, and legal requirements,” and because all private property rights are protected by “legal requirements,” reading Section 253 to prohibit any rents that fall outside the ambit of section 253(c) would necessarily mean that *no one* has a legal right to charge rent for property.

school could not charge to lease space for a telecommunications cabinet on a playground.²⁸ In the end, Verizon's proposal makes no sense. The FCC cannot change Congress's approach by confusing a safe harbor with the substantive test under (a). Verizon's proposal must be rejected.

In the end, there is no reason for the Commission to change its standards. Under the proper analysis, Section 253 requires the Commission to determine whether the requirements with respect to access to property even involve regulation of the sort that falls within the ambit of Section 253(a); to then determine whether the particular effect is prohibitory; and finally to determine whether the charges challenged are protected by Section 253(c) or (b). And that is precisely what the Commission has done.

III. SECTION 253(c) DOES NOT LIMIT A STATE OR LOCAL GOVERNMENT TO RECOVERING ITS COSTS FOR USE OF THE RIGHTS-OF-WAY.

As NATOA has shown in its comments, the legislative history demonstrates that Congress did not intend for Section 253(c) to limit a state or local government to collecting its costs in managing the rights-of-way. The FCC must respect Congress's decision.

The carriers cite several cases that they claim support the notion that fees are required to be limited to a municipality's costs for the use of its rights-of-way.²⁹ However, the one circuit that directly ruled on the issue, the Sixth Circuit, ruled that a gross revenue fee would qualify as "fair and reasonable compensation" under Section 253(c). *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000). There the court applied a "totality of the circumstances" test that

²⁸ Verizon's proposal would also shift the burden of proof from the challenger to the municipality in direct contravention of the Commission's rules and established case law. *Santa Fe*, 380 F.3d at 1269; *St. Louis*, 477 F.3d at 532; *Guayanilla*, 450 F.3d at 21.²⁸ If the Commission followed Verizon's logic, it would necessarily allow preemption without any evidence of the practical effect a fee has on a challenger's ability to provide service. Verizon, not surprisingly, provides no authority for its burden-shifting proposal.

²⁹ AT&T Comments at 18-20; Verizon Comments at 17.

considered a number of factors including the amount of use contemplated, the amount that other providers would be willing to pay, and the fact that the company had agreed in earlier negotiations to a fee almost identical to what it was challenging as unfair. *Id.* The Tenth Circuit likewise applied this totality of circumstances test and examined whether the City of Santa Fe's fees were fair reasonable, *even though* the City had acknowledged that its rent was not limited to its costs. *Santa Fe*, 380 F.3d at 1272.

The Second Circuit also recognized, without deciding the issue, that “[a]s ordinarily understood, ‘compensation’ often extends to more than costs.” *TCG New York, Inc. v. City of White Plains*, 305 F.3d at 77. The First Circuit noted that “most [courts] have not found gross revenue fees or other non-cost fees to be per se invalid under § 253(c).” *Guayanilla*, 450 F.3d at 21-22. The court ruled that fees should be “related to the actual use of rights of way,” but declined to rule that fees must be limited to costs. *Id.* at 22.³⁰

³⁰ The First Circuit's decision discusses costs, of course, but that discussion arises in an odd factual context. At the district court level, the court concluded that the City was entitled to recover both its costs and a reasonable rent in addition to costs, and that appears to be the basis on which it defended the ordinance. *P.R. Tel. Co. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534, 545 (D.P.R. 2003); (“P.R.Tel.Co.I”); *P.R. Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 111 (D.P.R.2005) (“P.R.Tel.Co.II”). The court of appeals cited this language approvingly. In *P.R.Tel.Co.II*, the district court noted that the City had presented no evidence and conducted no studies to determine the value of the property that was being used by telecommunications providers; it offered no evidence that anyone was paying a comparable rent for use of the rights-of-way, and it did not address the court's concern that it was actually recovering rents through other charges. The City having defended its ordinance on the ground that it was designed to recover costs and rents, and then having failed to justify the charge as rent under any test, the court was left to look to the other component – costs. And there it found that the City had likewise failed to introduce any relevant information. The decision does not hold that rents must be based on costs; otherwise the reference to rents and costs would be nonsensical (and the ruling as an economic matter would be highly suspect, at least if the Court were using costs as commenters use it, to refer to out-of-pocket incremental costs).

Time Warner Cable cites *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176 (9th Cir. 2001), but as the Ninth Circuit itself recognized, the decision *does not* decide that charges for the rights-of-way must be limited to costs. In that case, plaintiffs and defendants agreed that the communities could levy a 6 per cent fee in connection with their use of the rights-of-way, *Id.*, n. 10, but that no other rent was permitted. Hence, what was at issue were fees that the

The district court cases cited by the carriers certainly do not require the FCC to adopt this position. AT&T cites a district court decision, *Bell Atlantic Maryland v. Prince George's County*, 49 F. Supp. 2d 805, 815-17 (D. Md. 1999), that has been vacated.³¹ AT&T cites *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998),³² but that decision did not find that local governments were limited to costs. It declared that a fee must be tied to “use” of the rights-of-way. *Id.* AT&T also cites *PECO Energy Co. v. Township of Haverford*, 1999 WL 1240941, at *8 (E.D. Pa. Dec. 20, 1999),³³ an unpublished decision, which is entitled to “little credence.” *See Puerto Rico Tel. Co., Inc. v. Mun. of Guayanilla*, 283 F. Supp. 2d 534, 544 (D.P.R. 2003). AT&T further cites *XO Missouri v. City of Maryland Heights*, 256 F. Supp. 2d 987, 994 (E.D. Mo. 2003),³⁴ which is of questionable validity after the Eighth Circuit’s decision in *St. Louis*, 477 F.3d 528. AT&T and Verizon cite *New Jersey Payphone Association v. Town of West N.Y.*, 130 F. Supp. 2d 631, 637-38 (D.N.J. 2001),³⁵ but the court did not “choose

communities were charging pursuant to their police powers to recover costs – which is why the opinion mentions cost. The Ninth Circuit later confirmed expressly that its *Auburn* decision did not limit right-of-way compensation to cost. *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1243 (9th Cir. 2004).

³¹ AT&T Comments at 19.

³² AT&T Comments at 4.

³³ AT&T Comments at 20.

³⁴ AT&T Comments at 20.

³⁵ Contrary to Verizon’s claim at 17, the FCC did not suggest that fees exceeding municipal costs “would constitute unreasonable barriers to entry.” Verizon Comments at 17 (citing Brief of the Federal Communications Commission and the United States as *Amici Curiae* at 15 n.7, *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2001) (Nos. 01-7213, 01-7255)). The FCC, citing a district court case, noted that a question had been raised on the matter, but indicated the FCC “has not addressed the specific issue.” *Id.* Moreover, in a subsequent brief the FCC declined to take a position on the issue, stating, “the Commission respectfully refrains from taking a position on this set of questions beyond what was expressed in footnote 7 of our earlier brief, until after the agency has completed pending proceedings on rights-of-way management.” Supplemental Brief of the Federal Communications Commission and the United States as *Amici Curiae* at 10, *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2001) (Nos. 01-7213, 01-7255) (Mar. 11, 2002).

between [the] competing views” on the issue.³⁶ AT&T also cites *Board of County Commissioners v. Qwest Corp.*, 169 F. Supp. 2d 1243, 1250 (D.N.M. 2001), but that case was based on state law limits on a County’s authority to charge for use of rights-of-way, and not on federal law – a point made abundantly clear in the subsequent district court decision in *Qwest Corp. v. City of Santa Fe* 224 F. Supp. 2d 1305, 1321 (D.N.M. 2002).³⁷

The majority of courts have ruled that local governments are not limited to costs. In 2002, the district court in *Santa Fe* ruled:

The Court accepts the basic premise from this line of authorities that in order to fall within the savings clause of Section 253(c), the compensation required by a local government must directly relate to actual use of local rights-of-way. It does not necessarily follow, however, that cost-recovery is the only type of compensation that directly relates to actual use of local rights-of-way. If Congress had intended to limit local governments to charging cost-based fees for the use of public rights-of-way, Section 253(c) of the federal statute would have used the word “costs” instead of the word “compensation.” See *TCG Detroit*, 206 F.3d at 624-25.

Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305, 1327 (D.N.M. 2002). In 2003, the *Guayanilla* district court criticized decisions that limited local governments to costs:

The rub lies in the fact that, by limiting compensation to the out-of-pocket costs, the approach is only taking into account the supply-side component of the property right's value. The market value of a good, however, is not only determined by the supply-side (i.e. the cost of producing it), but also by the demand-side, or the amount that someone is willing to pay for the good. By not taking into account the opportunity costs of renting the municipality's property to the providers for free, this approach is effectively redistributing the resources, and transferring the municipality's property rights to the providers. Such an outcome is not only inherently unfair to the municipality, but it could also lead to the mis-allocation of resources, as inefficiencies could result from overuse of the rights-of-way, or the use of those rights-of-way by less efficient service providers.

Of course, we still believe, as the opinions cited by Defendants also hold, that a municipality's fees must be limited to an amount which is fair and reasonable, and which is directly related to the actual use of the rights-of-

³⁶ Verizon Comments at 17; AT&T Comments 20.

³⁷ AT&T Comments at 20.

way by each provider. We must remain aware that the municipality's ownership of the rights-of-way places it in a prime position from which to engage in monopolistic or discriminatory pricing. Such a result would also be highly inefficient, and perhaps more importantly, would be extremely detrimental to the free competition which is the ultimate goal of the Telecom Act. As such, courts have a duty to insure that any fees charged by a municipality only include amounts which 1) serve to recoup out-of-pocket expenses resulting from the use of the rights-of-way and, 2) ***constitute a reasonable rent for the use of said rights***. In addition, courts must make sure that such fees are levied in proportion to each provider's degree of actual use of the rights-of-way, so as to avoid any type of discriminatory pricing.

Guayanilla, 283 F. Supp. 2d at 544 (emphasis added). In 2005, a district court from the Ninth Circuit ruled:

Neither the terms of section 253(c), the legislative history, or relevant case law require that the fee charged by the City be restricted by the municipality's cost of maintaining the rights of way. Nor does it require absolute parity among providers and utilities in setting compensation levels. Rather, those restrictions are an overlay put forth by telecommunications providers . . . and it is not the law in any circuit. . . . The court finds that the Franchise fee charged by the City, 5% of ELI's gross revenues, is fair and reasonable.

City of Portland v. Electric Lightwave, Inc., 2005 WL 4044333 at *21 (D. Or. 2005).

As NATOA and NYSTA have shown, the plain language and legislative history of Section 253(c) dictates that fees are not limited to costs. The case law, on the whole, supports this conclusion.³⁸

³⁸ Qwest and other commenters, having asked that the Commission relieve them of any burden of proof, proceed to manufacture a test for costs that ignores value, and that indeed, actually ignores most costs. Turning property law on its head, commenters claim that they are entitled to free access to property until and unless the property owner conducts those studies, individualized for every entity that seeks access to the rights-of-way. We know of no principle consistent with the Fifth Amendment or Tenth Amendment under which such access may be commanded. And who are the providers suggesting would pay for these cost studies? Moreover, even when a municipality does undertake an expensive cost study, there is no guaranty that the study will not be challenged. This is precisely what happened to the City of Tulsa, Oklahoma, which undertook an expensive cost study, with the full participation of the industry, only to find itself later embroiled in a lawsuit with Verizon, which demanded additional proof (for which it would not pay). See *City of Tulsa, Oklahoma v. MCI Metro Access Transmission Services LLC and MCI Communications Services, Inc.*, Case No. 07-CV-470-TCK-SAJ (N.D. Okla.). The demand for

IV. THIS PROCEEDING IS NOT THE PROPER FORUM TO ADDRESS STANDARDS FOR INTERPRETING SECTION 253 GENERALLY.

This limited proceeding is an inappropriate forum to make broad changes in the Commission's standards for applying Section 253. In addition to the fact that the providers have failed to serve the cities of whose actions they specifically complain, the anecdotal stories they tell, akin to "municipalities gone wild," are for the most part either misleading or untrue. St. Louis agrees with NATOA that it is bad policy to make rules based on anecdotes rather than facts.

Qwest provides a good example of why the Commission should not make rules based on anecdotes. Qwest claims "local governments . . . are impeding and prohibiting the provision of services through excessive fees and fee increases that are sometimes massive in nature." Qwest Comments at 3. Qwest provides several examples in an attempt to illustrate its claims but it mischaracterizes the facts in ways that are misleading and inaccurate. For example, Qwest describes its dispute over a fee increase introduced by the Elephant Butte Irrigation District ("EBID") in New Mexico, which Qwest claims ended with "EBID [being] eventually enjoined from enforcing its revised fee schedules, but only after a long and expensive legal struggle. *See Qwest Corp. v Elephant Butte Irrigation Dist.*, 2009 WL 2252199, at *1-2, (D.N.M. May 19, 2009)."³⁹ The description and case citation leaves the impression that Qwest was victorious in court, but that is not the case. In fact, the parties settled, agreeing on a different fee schedule and Qwest dropped its case. The referenced document is not a court ruling but a "Stipulated

these studies cannot be squared with the notion of Section 253(c) as a safe harbor, but of course, the goal here is not to maintain a safe harbor: the goal is to eliminate it. The alternative to undertaking an expensive cost study is for municipalities essentially to charge a *de minimis* amount for the use of their rights-of-way, meaning they will almost certainly be incurring greater expenses than they are able to recover from users of their rights-of-way. But that is what commenters desire.

³⁹ Qwest Comments at 4.

Judgment and Agreed Judgment of Dismissal.” There were no court findings on any of the violations alleged by Qwest. Most importantly, in the Stipulated Judgment, EBID denied both that its actions violated Section 253 and that Section 253 applied to it.

Qwest also mischaracterizes the situation in Deming, New Mexico. Qwest claims that Deming unilaterally sought to increase right-of-way fees in 2007 and when the company objected, the City filed a criminal complaint. In fact, Qwest’s previous franchise with the City of Deming expired in 2001 and since that time Qwest refused to enter into any negotiations for a new franchise with the City even though a franchise is required to occupy the rights-of-way under City law. Deming City Code § 8-5-1B. After years of an impasse, the City finally sought a citation against Qwest for occupying the rights-of-way without a franchise. Once cited, Qwest requested that the City drop the citation and agreed to enter into franchise renewal negotiations. But the company has repeatedly failed to negotiate (other than to say “no” to City proposals). The City has not sought a further citation or to otherwise enforce its franchise requirements, as it does not have the financial resources to get into protracted litigation with Qwest.⁴⁰

Not only are the anecdotes provided by Qwest and others misleading,⁴¹ but as the facts are gleaned it becomes evident that the providers are the ones acting in an abusive manner, refusing to abide by franchise requirements and pay legitimate right-of-way fees, and litigating at every turn. In any event, the anecdotal stories should be disregarded in this proceeding.


⁴⁰ See Affidavit of Richard F. McInturff, attached hereto as Exhibit A.

⁴¹ See NATOA Reply Comments (debunking Qwest claims about Demming, N.M., and Verizon claims about Eugene and Portland).

V. CONCLUSION

For the reasons indicated, the FCC should deny the Petition.

Respectfully submitted,


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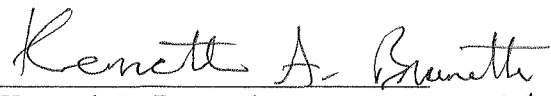
Counsel for the City of St. Louis, Missouri

November 5, 2009

CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Reply Comments, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,


Kenneth A. Brunetti *mkj*

November 5, 2009

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Level 3 Communications, LLC

Petition for Declaratory Ruling That Certain
Right-of-Way Rents Imposed by the New York
State Thruway Authority Are Preempted Under
Section 253

Docket No. WC 09-153

AFFIDAVIT OF RICHARD F. McINTURFF

I, Richard F. McInturff declare as follows:

1. I am the City Manager for the City of Deming, New Mexico. I submit this affidavit in response to the Comments of Qwest Communications International Inc. ("Qwest"), which have been submitted in this proceeding and which I have reviewed.

2. Qwest is the incumbent operator providing telecommunications services in the City of Deming. As City Manager, I am very familiar with the dealings between Qwest and the City.

3. On pages 6 and 7 of its comments Qwest describes certain dealings between Qwest and the City of Deming in 2007. The description provided by Qwest therein is both misleading and false.

4. Specifically, Qwest claims that Deming unilaterally sought to increase right-of-way fees in 2007 and when the company objected, the City filed a criminal complaint. In fact, Qwest's previous franchise with the City of Deming expired in 2001 and since that time Qwest has refused to enter into any negotiations for a new franchise with the City even though a franchise is required to occupy the rights-of-way under City law. Deming City Code § 8-5-1B.

5. After years of an impasse, the City finally sought a citation against Qwest for occupying the rights-of-way without a franchise. That is the nature of the complaint Qwest describes in its comments. The City did not attempt to seek imprisonment for any employees of Qwest, as the company

suggests. The City was simply attempting to get a civil citation as a result of the company's failure to abide by the City's franchise requirements.

6. After the citation was issued, Qwest requested that the City drop the citation and agreed to enter into franchise renewal negotiations. At the time, we believed we had made progress with Qwest.

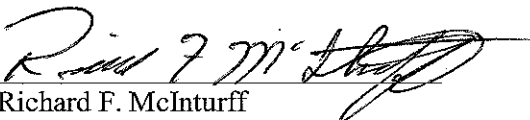
7. In subsequent discussions and written exchanges with Qwest, however, it became evident that Qwest would not negotiate in good faith. Qwest never stated its position on any issue we raised and it repeatedly responded to language proposed by the City with "no" without further explanation.

8. Eventually, the City withdrew from franchise negotiations with Qwest, as we realized further discussion were non-productive.

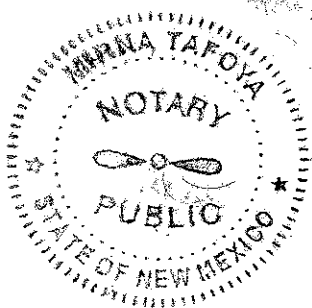
9. The City has not sought a further citation or to otherwise enforce its franchise requirements against Qwest, as it does not have the financial resources to get into protracted litigation.

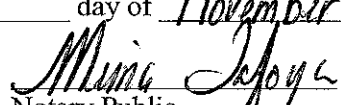
I declare under penalty of perjury under the laws of the United States of America and the State of New Mexico that the foregoing is true and correct.

EXECUTED this 5th day of November, 2009 in Luna County, New Mexico.


Richard F. McInturff

SUBSCRIBED AND SWORN to before me this 5th day of November, 2009.




Notary Public
My Comm. Expires: 4-29-10